

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Direct Access to the  
INTELSAT System

To: The Commission

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IB Docket No. 98-192 ✓  
File No. 60-SAT-ISP-97

DEC 22 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS OF  
PANAMSAT CORPORATION

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**COMMENTS OF  
PANAMSAT CORPORATION**

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby comments on the Notice of Proposed Rulemaking ("NPRM") adopted in the above-captioned proceeding on October 22, 1998.

**INTRODUCTION/SUMMARY OF ARGUMENT**

PanAmSat supports the Commission's effort to bring an end to Comsat's monopoly over the provision of Intelsat capacity to users within the United States. Comsat's customers should have the ability to deal directly with Intelsat, or with competitive providers of Intelsat-based services, to secure capacity on the Intelsat system. In light of the many regulatory and market changes that have occurred since Comsat first was given its monopoly, there is no justification for continuing to afford Comsat such a privileged, protected position.

The question of direct access can best be resolved by Congress as part of its broader effort to up-date the 1962 Satellite Act and normalize Comsat's ownership structure. This is particularly so in view of the Commission's position that it does not have legal authority to permit Level 4, investment, direct access to Intelsat. There is, however, no more reason to preserve Comsat's monopoly on investment in Intelsat than there is to preserve its service monopoly. Unfortunately, the Commission can take only a piecemeal approach, while the Congress can enact comprehensive international satellite legislation that not only up-dates the Satellite Act but also fosters the pro-competitive privatization of Intelsat.

If, however, the Commission chooses not to defer to Congress, then it should authorize contractual, Level 3, direct access in all markets and on all routes. As a legal

matter, the Commission currently has the authority to afford carriers and end users Level 3 direct access. As a policy matter, direct access — if properly implemented — will serve the public interest by introducing competition into non-competitive markets and enhancing competition in markets where competition does exist.

Direct access does not constitute a “taking” under applicable Fifth Amendment precedents. Comsat has no vested property interest in monopoly access to the Intelsat system. Even if it did have a property interest, permitting other carriers to access Intelsat directly does not rise to the level of a taking. In a direct access regime, Comsat still would be able to earn a fair return on its investment in the Intelsat system. In any event, direct access should not be accompanied by any “surcharge” or other fee.

In addition, in order for direct access to achieve its intended benefits, it must be accompanied by certain corollaries. Specifically, any order authorizing direct access explicitly should rely on the recent amendments to the Foreign Corrupt Practices Act, which clarify that Intelsat’s immunity from suit and legal process does not apply to its commercial activities. Before Intelsat is permitted to serve end users in the United States, it must explicitly acknowledge that it has no immunity from U.S. legal process for its commercial activities. Intelsat must be subject to the same legal processes — and the same degree of Commission regulation — that any other commercial satellite operator faces.

Finally, Comsat’s existing customers should be granted fresh look rights in order to ensure that all U.S. carriers and end users — including those who entered into long-term agreements with Comsat while Comsat’s monopoly remained intact — are able to enjoy immediately the benefits offered by direct access.

**I. THE CONGRESS IS CONSIDERING THE ISSUE OF DIRECT ACCESS AS PART OF A SWEEPING OVERHAUL OF THE 1962 SATELLITE ACT.**

The Congress created Comsat before there was even the prospect of a commercial satellite industry. As a result, the Satellite Act reflects then-prevailing, but now outmoded, views about the manner in which satellite communications would be delivered and the prospects for competition in the international satellite marketplace. In the thirty-six years that have passed since enactment of the Satellite Act, the world has witnessed profound changes in the satellite communications marketplace. Most importantly, competition has replaced monopoly in many markets; Intelsat and Comsat have diversified into competitive, non-jurisdictional lines of business; and, even with

respect to its traditional services, Comsat has been transformed from a "carrier's carrier" into a full service provider.

The FCC has attempted to modify its regulation of Comsat to reflect both Comsat's changing nature and the evolution of the marketplace within which Comsat operates. In many cases, however, the Commission has been hamstrung by the Satellite Act's outmoded requirements. For example, in the instant rulemaking the Commission tentatively has concluded that it does not possess the authority to authorize Level 4 direct access, even were it to conclude that this form of direct access would serve the public interest.<sup>1</sup>

Given the limitations in the Commission's jurisdiction, it cannot take the requisite comprehensive approach. The policy implications of direct access, and the potential public benefits of authorizing direct access, are inextricably intertwined with issues such as Comsat's role as the U.S. Signatory to Intelsat, Comsat's ownership (and its proposed purchase by Lockheed Martin), and Intelsat's privatization. Only Congress can consider and resolve these questions free from the constraints of a nearly forty-year-old statute.

Accordingly, the Commission should encourage the Congress to accelerate its sweeping overhaul of the 1962 Satellite Act and normalization of Comsat's ownership structure.<sup>2</sup>

**II. IF THE COMMISSION ELECTS TO ACT AT THIS TIME, IT SHOULD AUTHORIZE LEVEL 3 DIRECT ACCESS ON ALL INTELSAT ROUTES AND FOR ALL INTELSAT SERVICES.**

**A. THE COMMISSION HAS THE LEGAL AUTHORITY TO AUTHORIZE LEVEL 3 DIRECT ACCESS.**

The Commission tentatively, and correctly, concluded in the NPRM that neither the Satellite Act nor the U.S. Constitution prohibits it from authorizing Level 3 direct access. Comsat's pleas to the contrary reflect its desire to preserve its monopoly and its inability to recognize that its historically privileged status does not confer upon it an

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<sup>1</sup> E.g., NPRM at ¶ 19.

<sup>2</sup> See H.R. 1872, "Communications Satellite Competition and Privatization Act of 1998" (passed by the House of Representatives May 13, 1998); see also S. 1328, S. 2365 (introduced but not passed by the Senate). Although legislation amending the Satellite Act was not enacted in the 105th Congress, the 106th Congress is expected to take up legislation early in its session.

entitlement to retain its monopoly in perpetuity. The Commission has never addressed the question of whether it possesses the statutory authority to authorize direct access, much less concluded that it lacks this authority. As a result, Commission precedent in no way prevents the Commission from authorizing direct access.

The fact that, on two occasions in the past thirty-seven years, the Commission has recognized in *dicta* Comsat's historical role as the sole provider of Intelsat services in the United States does not limit the Commission's legal authority now to authorize direct access.<sup>3</sup> The Commission's prior statements reflected the *status quo*; at the time they were made, they did not transform the *status quo* into a mandatory legal regime.

**B. DIRECT ACCESS DOES NOT CONSTITUTE AN UNCOMPENSATED "TAKING" IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

In the NPRM, the Commission engaged in an extensive analysis of the constitutional issues implicated by direct access. It tentatively concluded that Comsat has no constitutional right to maintain a monopoly in the provision of Intelsat services within the United States. Moreover, Comsat's opportunity to earn a fair return on all capacity used by direct access customers provides just compensation and, therefore, negates any Fifth Amendment claim.<sup>4</sup>

PanAmSat concurs with the Commission's analysis. Comsat's takings claim ignores three crucial facts:

- Congress never granted Comsat the right to maintain a monopoly in providing Intelsat services to United States users;
- direct access will not deny Comsat the right to compete fairly in the market for Intelsat-based services; and
- Comsat — unlike its competitors — will continue to receive a guaranteed return on its investment in Intelsat, including on Intelsat capacity that is used by direct access customers.

For nearly forty years, Comsat has been the beneficiary of a regulatory structure that has shielded it from full competition while guaranteeing it a very high return on its invested capital. As much as Comsat might like the *status quo* to remain in effect, it does

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<sup>3</sup> See NPRM at ¶¶ 27-28.

<sup>4</sup> NPRM at ¶¶ 31-43.

not have a constitutional right to maintain its monopoly and the Commission should reject Comsat's attempt to use the Constitution to preserve its privileged status.

**C. THE COMMISSION SHOULD ADOPT A PRESUMPTION IN FAVOR OF DIRECT ACCESS.**

Before it can analyze the merits of direct access, the Commission must define its basic analytical approach. Consistent with the fundamental premises underlying Commission regulation, the Commission should preserve Comsat's monopoly in the provision of Intelsat capacity to U.S. users *only* if Comsat submits clear and compelling evidence demonstrating that: (i) direct access will harm the public interest; and (ii) any problems presented by direct access cannot be addressed using alternative regulatory tools.

In its 1984 direct access proceeding, the Commission began from a fundamentally different premise. Throughout its analysis, the 1984 Direct Access Order reflects an unwillingness to depart from the *status quo*, a deeply-held belief in the adequacy of regulation to curb a monopolist's anti-competitive impulses, and a profound hesitancy to rely on market forces — rather than regulation — to structure the domestic satellite communications marketplace.<sup>5</sup>

Since 1984, the Commission and other U.S. telecommunications policy makers have abandoned the assumptions underlying the 1984 Direct Access decision. Today, competition is seen as far superior to regulation and monopolies are viewed as meriting preservation only in the most extraordinary circumstances. Even the local telephone monopolies — long viewed as “natural” monopolies whose elimination was both impossible and unwarranted — are being dismantled by Federal and state regulators.

Accordingly, the Commission should deny Intelsat's users competitive alternatives to Comsat only in the face of clear and compelling evidence demonstrating that the market for Intelsat capacity is uniquely unable to benefit from competition.<sup>6</sup>

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<sup>5</sup> *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, Report and Order*, 97 FCC 2d 296 (1984), *aff'd*, *Western Union International, Inc. v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986) (“1984 Direct Access Order”).

<sup>6</sup> This analysis should apply to all routes and all services. In the case of routes and services as to which the Commission has determined that Comsat has market power, direct access serves to constrain that market power. In the case of other markets and services, direct access maximizes consumer choice and eliminates an artificial constraint on service providers.

**D. DIRECT ACCESS WILL DRIVE DOWN END-USER CHARGES. COMSAT SHOULD NOT BE ALLOWED TO IMPOSE A SURCHARGE TO INCREASE END-USER COSTS.**

Comsat's charges to end users exceed Intelsat's underlying charge for satellite capacity — the "Intelsat Utilization Charge," or "IUC" — by as much as 250 percent, even when Comsat provides no facilities of its own to the customer.<sup>7</sup> Comsat's average margin over the IUC is 68 percent,<sup>8</sup> meaning that Comsat either is earning excess rewards or is spending 2/3 as much to support Intelsat and market Intelsat services as Intelsat itself is spending to design, build, launch, operate, insure, and maintain a global satellite system. According to a comprehensive study of direct access, U.S. customers could save \$1.5 billion over ten years if they were given the right to access the Intelsat system directly.<sup>9</sup>

Comsat also has claimed that the majority of its costs lie outside its control and, therefore, would be unaffected by any competitive pressure. As discussed above, however, Comsat marks up the IUC substantially, and many of the costs that Comsat allegedly is recovering through its markup are discretionary.<sup>10</sup>

Comsat has argued that direct access customers will be able to avoid paying the costs that Comsat must incur as an Intelsat Signatory and carrier of last resort and wants to impose a surcharge on direct access customers to defray these costs. Comsat, however, has not detailed the costs that it believes merit repayment from direct access customers and it is not possible to comment fully on the details of any such surcharge.<sup>11</sup> It is, however, difficult not to question the fairness of a surcharge on direct access customers. Comsat receives a guaranteed return of up to 21 percent on its investment in Intelsat — and Comsat will continue to receive this guaranteed return on any Intelsat

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<sup>7</sup> NPRM at ¶ 45 (citing Satellite Users' Coalition, "Analysis of Privatization of the Intergovernmental Satellite Organizations," at pp. 17 and 23-24).

<sup>8</sup> Id.

<sup>9</sup> Satellite Users' Coalition, "Analysis of the Privatization of the Intergovernmental Satellite Organizations," at p. 2 (March 1998).

<sup>10</sup> For example, Comsat has control over its marketing/sales costs, transactions costs, internal operational costs, and regulatory compliance costs. In addition, it has some control over its Signatory costs: for example, while Comsat representatives must attend Intelsat meetings, Comsat can exercise some control over the number of representatives it sends and the amounts it authorizes those representatives to spend on travel, lodging, and other expenses.

<sup>11</sup> In the NPRM, the Commission directed Comsat to submit detailed information concerning the costs it claims it incurs in performing its Signatory functions. See NPRM at ¶ 47.



capacity that is used by a U.S. direct access customer.<sup>12</sup> This return should be sufficient to compensate Comsat for the costs it reasonably should incur in fulfilling its Signatory functions.

Moreover, Comsat has benefited, and continues to benefit, in a host of other ways from its status as the U.S. Signatory to Intelsat. As the U.S. Signatory, Comsat enjoys relationships with telecommunications carriers around the globe that are the envy of its existing and would-be competitors. As the U.S. Signatory and, historically, the government-sanctioned monopoly provider of Intelsat services within the United States, Comsat has developed a customer base and name recognition that will continue to secure and enhance its market position long after direct access is authorized.

**III. IN ORDER FOR DIRECT ACCESS TO FOSTER FULL COMPETITION, IT MUST BE ACCOMPANIED BY REGULATION OF INTELSAT'S COMMERCIAL ACTIVITIES AND "FRESH LOOK" FOR COMSAT'S CUSTOMERS.**

Authorizing direct access will not, on its own, create the conditions necessary for full competition in the international satellite services market. The Commission, therefore, should authorize direct access only if, at the same time, it takes two related actions: (i) regulation of Intelsat's commercial activities in the United States; and (ii) fresh look rights for Comsat's existing customers.

**A. THE COMMISSION MUST REGULATE INTELSAT AS A COMMERCIAL SATELLITE OPERATOR.**

If Intelsat is to provide service directly to U.S. customers, it must not be allowed to take advantage of its status as an intergovernmental organization. As the Commission concluded in its DISCO II Report and Order, Intelsat's privileges and immunities benefit it unfairly *vis-a-vis* competing satellite providers.<sup>13</sup> Comsat itself has acknowledged that direct access for an immune Intelsat would be problematic.<sup>14</sup>

Accordingly, the Commission should rely on the recent amendments to the Foreign Corrupt Practices Act ("FCPA")<sup>15</sup> and declare that Intelsat has no immunity from legal process or regulation in this country. Moreover, as a condition on its entry

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<sup>12</sup> NPRM at ¶ 9.

<sup>13</sup> DISCO II, 12 FCC Rcd 24094 at 24138, 24148 (1997).

<sup>14</sup> NPRM ¶ 56.

<sup>15</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998); H.R. Rep. No. 105-802, 105th Cong., 2d Sess.

into the “retail” market in the United States, Intelsat should have to acknowledge that such immunity is lacking.

In the FCPA amendments, Congress clarified that Intelsat’s quasi-governmental immunity from suit and legal process does not apply to its commercial activities. Specifically, in Section 5(c) of the 1998 FCPA amendments, Congress provided that:

[e]xcept as required by international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process for any act or omission taken in connection with such organization’s capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States.<sup>16</sup>

There is no international agreement that gives Intelsat immunity for its commercial activities. Intelsat is fully subject to U.S. law when it provides commercial telecommunications services to, from, or within the United States.

Specifically, the Commission should treat Intelsat as it would any other similarly situated carrier providing services to, from, or within the United States. In particular, it should:

- require Intelsat to file applications, pay application and regulatory fees, and vie for orbital locations on the same terms and conditions as its competitors;
- subject Intelsat to dominant carrier regulation on all routes and in all markets, unless and until the Commission decides (after appropriate public comment) that Intelsat is not dominant on one or more routes or in one or more markets;
- closely scrutinize Intelsat’s tariffs (*i.e.*, its IUCs) to ensure that they are cost-based, non-discriminatory, and otherwise comply with Title II of the Communications Act;
- enforce strictly the Commission’s “no special concessions” policy against Intelsat and any foreign entity (including its Signatories) with whom it deals; and
- otherwise require Intelsat to comply with all requirements of Titles II and III of the Communications Act.

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<sup>16</sup> International Anti-Bribery and Fair Competition Act of 1998, § 5(c).

**B. THE COMMISSION SHOULD INSTITUTE “FRESH LOOK.”**

Many of Comsat’s existing customers are locked into long-term agreements. Because these agreements were negotiated and entered into at a time when the customers were required to use Comsat for their public switched international satellite requirements, direct access will provide a meaningful opportunity to them only if they have a legal right to terminate their existing agreements without penalty. As a result, it is essential that, in connection with any direct access regime, the Commission grant “fresh look” rights to Comsat’s existing customers.<sup>17</sup>

Long before the Commission adopted its Comsat Non-Dominant Order, PanAmSat submitted a petition urging the Commission to grant “fresh look” rights to Comsat’s customers as part of any order reclassifying Comsat as non-dominant.<sup>18</sup> The Commission did not rule on PanAmSat’s petition when it issued its Comsat Non-Dominant Order.

In a series of recent *ex parte* presentations, Comsat has attempted to transform the Commission’s silence on the question of “fresh look” into a rejection of PanAmSat’s petition and the need for “fresh look” rights for Comsat’s customers.<sup>19</sup> Comsat’s analysis, however, is deficient.

In the Comsat Non-Dominant Order, the Commission considered whether Comsat’s long-term agreements with certain major customers made it a dominant carrier in the switched services market by precluding competitors from serving a large share of that market, even on routes nominally open to competition. The Commission decided that this was not the case, because the contracts represented only 25 percent of the U.S. switched voice services market and only obligated Comsat’s customers to transmit a portion of their voice traffic using Comsat.<sup>20</sup> As to the remainder of the

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<sup>17</sup> The arguments in favor of granting fresh look rights to Comsat’s existing customers are set forth in greater detail in other PanAmSat filings. *See* Motion of PanAmSat Corporation to Apply the “Fresh Look” Doctrine to Comsat, File No. 108-SAT-MISC-95 (filed Apr. 1995); Letter, dated February 26, 1998, from Henry Goldberg, Counsel for PanAmSat, to Regina M. Keeney, Chief, International Bureau, renewing and updating PanAmSat’s initial fresh look request.

<sup>18</sup> *See* note 17, *supra*.

<sup>19</sup> *See* Comsat Corporation, Ex Parte Presentations (FCC File No. 108-SAT-MISC-95) dated October 16, 1998.

<sup>20</sup> Comsat Non-Dominant Order at ¶ 73; *see also id.* at ¶ 81.

carriers' traffic, the Commission concluded, Comsat's customers were free to use other carriers or their own facilities.<sup>21</sup>

The Commission's determination that Comsat's long-term agreements do not cover all switched voice services — and, as a result, do not make Comsat dominant in the switched services market — does not negate the public interest benefits that would flow from creating a fresh look period for these customers. If the Commission authorizes direct access and institutes fresh look, customers that are presently locked into long term contracts will have the ability to re-negotiate with Comsat, in the new, more competitive environment.<sup>22</sup>

### CONCLUSION

PanAmSat supports ending Comsat's monopoly over the provision of Intelsat capacity to U.S. users. Because Congress is in the best position to resolve the question of direct access within a broader framework, PanAmSat respectfully urges the Commission to defer action on the NPRM until Congress has had a reasonable opportunity to enact legislation up-dating the Satellite Act. If, however, the Commission chooses not to defer to Congress, PanAmSat urges it to:

- authorize Level 3 direct access in all markets and on all routes;
- reject Comsat's attempt to impose on direct access customers a mandatory surcharge or, at a minimum, strictly limit the size and duration of any surcharge;

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<sup>21</sup> Comsat Non-Dominant Order at ¶ 73.

<sup>22</sup> Comsat's citation to the court's decision in Alpha Lyracom Space Communications, Inc. v. COMSAT Corporation, 968 F. Supp. 876 (S.D.N.Y. 1996), *aff'd*, 113 F.3d 372 (2nd Cir. 1997), is equally misplaced. In that decision, the court concluded that Comsat did not secure its long-term contracts by means of an anticompetitive act against PanAmSat. This finding, however, is unrelated to the question of whether "fresh look" is in the public interest. Even if the carriers did freely elect to enter into long-term arrangements with Comsat, they did so in the face of a monopoly that forced them to deal with Comsat if they desired to use capacity on the Intelsat system. If Comsat's monopoly is terminated, these customers should have the right to re-consider whether to continue to do business through Comsat.

- have Intelsat acknowledge that it has no immunity from legal process or regulation in this country and subject Intelsat to the same degree of regulation faced by any other commercial satellite operator; and
- grant Comsat's existing customers fresh look rights.

Respectfully submitted,

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